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NO. 80-339

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SECURITY MANAGEMENT CO., INC. AND BRUCE R. DAVIS,

Petitioners,

v.

JACK ROTHENBERG AND SHIRLEY ROTHENBERG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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On the Brief

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement of the Case	2
Argument	5
I. THE ACTION OF THE DISTRICT COURT IN DIRECTING THAT JUDGMENT BE ENTERED IN FAVOR OF RESPONDENTS WAS A PROPER EXERCISE OF THAT COURT'S DISCRETION UNDER RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE	5
II. NO SEPARATE WRITTEN STATEMENT OF REASONS FOR THE ENTRY OF AN ORDER PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS REQUIRED BY THAT RULE OR BY ANY DECISION OF THIS COURT	11
III. THE DECISION BELOW IS NOT IN CONFLICT WITH A DECISION BY THE COURT OF APPEALS OF GEORGIA	14
IV. THE COURT BELOW DID NOT ERR IN REFUSING TO STAY THE ENTRY OF ITS MANDATE IN VIEW OF A DECLARATORY JUDGMENT ACTION FILED BY THE PETITIONERS IN A STATE TRIAL COURT	15

V. THE COURT BELOW DID NOT ERR IN ITS REFUSAL TO CERTIFY CERTAIN QUESTIONS TO THE SUPREME COURT OF GEORGIA AS REQUESTED BY PETITIONERS IN THEIR PETITION FOR REHEARING 17

Conclusion 18

TABLE OF CITATIONS

CASES:

Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360 (3rd Cir., 1975) 11
Arlinghaus v. Ritenour, 543 F.2d 461 (2nd Cir., 1976) 11
Brown v. Brown, 212 Ga. 202, 91 S.E. 2d 495 (1956) 16
Butner v. United States, 440 U.S. 48 (1979) 15
Chilivis v. Dasher, 236 Ga. 669, 225 S.E. 2d 32 (1976) 10, 16
Commissioner v. Bosch's Estate, 387 U.S. 456 (1967) 15
Cort v. Ash, 422 U.S. 66 (1975) 15
Curtis Wright Corp. v. General Electric Co., — U.S. —, 64 L.Ed. 2d 1 (1980) 6, 11, 13
Gumer v. Shearson, Hammill & Co., Inc., 516 F.2d 283 (2nd Cir., 1974) 11
Huckeby v. Frozen Food Express, 555 F.2d 542 (5th Cir., 1977) 13
Hurn v. Oursler, 289 U.S. 238 (1933) 2
Kirtland v. J. Ray McDermott & Company, 568 F.2d 1166 (5th Cir., 1978) 13
Lehman Bros. v. Schein, 416 U.S. 386 (1974) 17
Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977) 7
Neely v. Eby Construction Co., 386 U.S. 317 (1967) 6
Pisano v. Bruce R. Davis and Security Management Co., Inc. Civil Action No. 621029 ..... 9, 10
Pisano v. Security Management Co., Inc., 148 Ga. App. 567, 251 S.E. 2d 798 (1978) 8, 14

Pope v. City of Atlanta, 240 Ga. 177, 240 S.E. 2d 241 (1977) at 243 ..... 10, 16
Richards v. United States, 369 U.S. 1 (1962) 15
Runyon v. McCreary, 427 U.S. 160 (1976) 15
Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) 6
Second National Bank of New Haven v. United States, 387 U.S. 456 (1967) 15
Siler v. Louisville & Nashville Railroad Co., 213 U.S. 175 (1909) 7
United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 2, 7
U.S. General, Inc. v. City of Joliet, 598 F.2d 1050 (7th Cir., 1979) 11, 12
United States v. Ortiz, 422 U.S. 891 (1975) 6
Woods v. Delta Airlines, Inc., 237 Ga. 332, 227 S.E. 2d 376 (1976) 16

STATUTES AND RULES

Federal Statutes and Rules

15 U.S.C. §§77l(1) and (2) (§§12(1) and 12(2) Securities Act of 1933) 7, 8
15 U.S.C. §77v (§22 Securities Act of 1933) 2
15 U.S.C. §78j(b) (§10(b) Securities Exchange Act of 1934) 3
15 U.S.C. §78aa (§27 Securities Exchange Act of 1934) 2
28 U.S.C. §1337 2
Rule 54(b), Federal Rules of Civil Procedure 1, 2, 5, 6, 7, 8, 10, 11, 12, 13
Local Rule 21(1)(A)(b)(i) of the United States Court of Appeals for the Third Circuit 13

Georgia Statutes

Ga. Code Ann. §20-701 6
Ga. Code Ann. §110-1101(a) 16
Ga. Code Ann. §110-501 16

LOCAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

. . . . . .

Rule 21. Briefs, Appendix, Motions and Other Papers

(1) Contents of Briefs. The briefs of all parties shall be in accordance with Federal Rules of Appellate Procedure 28(c)—(i).

Brief of the Appellant, F.R.A.P. 28(a) is modified for use in this Court to read as follows:

A. *Brief of the Appellant or Petitioner.* The brief of the appellant or petitioner shall contain under appropriate headings and in the order here indicated:

(a) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(b) (i) If the appeal is from the judgment of a district court, a statement of subject matter jurisdiction containing a certification that the appeal is from a final judgment in accordance with 28 U.S.C. §1291; or is a specific exception for interlocutory decisions as provided in 28 U.S.C. §1292; or, if the appeal is from an action involving multiple claims or multiple parties, a certification that the final judgment applies to all claims or parties, or that the district court has made a proper express determination that there is no just reason for delay and an express direction for the entry of judgment under F.R.C.P. 54(b).

GEORGIA CODE:

20-701 By whom contracts construed

The construction of a contract is a question of law for the court. Where any matter of fact is involved

(as the proper reading of an obscurely written word), the jury should find the fact.

110-501 Conclusiveness of judgments

A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered, until such judgment shall be reversed or set aside.

110-1101 Power of superior courts to declare rights and legal relations; cases in which power can be exercised; effect of other adequate remedy

(a) In cases of actual controversy the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights, and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-339

SECURITY MANAGEMENT CO., INC. AND BRUCE R. DAVIS,

Petitioners,

v.

JACK ROTHENBERG AND SHIRLEY ROTHENBERG,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the district court abused the discretion granted by Rule 54(b) of the Federal Rules of Civil Procedure in certifying for immediate appeal its order granting partial summary judgment to plaintiffs-respondents.

2. Whether the district court is required to provide a separate written statement of the reasons for the

entry of an order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

3. Whether the decision below was in conflict with a decision by the Court of Appeals of Georgia.

4. Whether the court below erred in refusing to stay the entry of its mandate in view of a declaratory judgment action filed by defendants-petitioners in a state trial court.

5. Whether the court below erred in refusing to certify certain questions to the Supreme Court of Georgia as requested by petitioners in their petition for rehearing in the court below.

STATEMENT OF THE CASE

The respondents, Jack Rothenberg and Shirley Rothenberg, instituted the action below on January 27, 1977, by filing an eight count complaint. Jurisdiction over the complaint was alleged on the basis of Title 28, United States Code, §1337; Section 22 of the Securities Act of 1933, (Title 15, United States Code §77v); Section 27 of the Securities Exchange Act of 1934 (Title 15, United States Code §78aa); and on the concept of pendent jurisdiction as enunciated in *Hurn v. Oursler*, 289 U.S. 238 (1933) and *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). Counts I, III and V of the complaint were based upon alleged violations of the Securities Act of 1933, Counts II and IV were based on alleged violations of the Georgia Securities Act of 1957, Count VI was based upon an alleged violation of Rule 10(b)(5)

promulgated by the United States Securities and Exchange Commission, pursuant to the authority granted under Section 10(b) of the Securities Exchange Act of 1934 (Title 15, United States Code §78j(b)), Count VII was based upon alleged fraud and deceit arising under the Georgia Securities Act and other Georgia statutes, and Count VIII alleged a cause of action for damages arising from the breach of a contract entered into by two of the defendants below, Bruce R. Davis and Security Management Co., Inc., the petitioners here. (R.3-11).

The complaint arose out of the respondents' purchase of stock in Security Management Co., Inc. for $50,000 on July 31, 1972 as a result of certain representations made to them by various of the defendants, including the representation that a return of $50,000 on their original investment would be guaranteed by the corporation and by Bruce R. Davis, the president of the corporation, personally. The Rothenbergs, as plaintiffs below, contend that they were thus promised that they would obtain stock in a corporation, worth $50,000 at the date of the purchase, and also a return on that stock of an additional $50,000, pursuant to a guarantee of payment made by Security Management Co., Inc. and Bruce R. Davis. As a result of alleged misrepresentations and fraudulent actions taken by the various defendants below, the stock acquired by the respondents became worthless, and they received only $8,625.00 of the guaranteed payments promised to them by petitioners. Therefore, the respondents, as plaintiffs below, alleged in their complaint that the actions of the various defendants defrauded them of all but $8,625.00 of the total of $100,000 either invested by them in the corporation or promised to them as a

guaranteed return in addition to their original $50,000 investment in the corporation.*

By order entered on July 1, 1977, Counts I, III and V of the complaint were dismissed on the motion of the defendants below, but the remaining counts of the complaint were continued. (R.156-168). In the same order, the district court expressly accepted pendent jurisdiction over the remaining counts of the complaint based upon alleged violations of Georgia law, including Count VIII. (R.167-168). On November 18, 1978, another order was entered granting the motion of defendants below to dismiss Counts II and IV of the complaint, but the order again refused to dismiss Counts VI, VII and VIII of the complaint. (R.289-291). Thereafter, the case proceeded on the basis of Counts VI, VII and VIII with pendent jurisdiction over Counts VII and VIII based upon the federal cause of action alleged in Count VI of the complaint.

Respondents filed a motion for partial summary judgment in the district court with respect to the issue raised in Count VIII on the ground that the issue was entirely a legal issue involving the interpretation of two similar guarantee contracts, the resolution of which could in no way affect the resolution of the securities fraud action embodied in Count VI of the complaint. This motion for partial summary judgment was granted by the district court on Janu-

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* Although the Rothenbergs ultimately also received stock in another corporation, Security Investment Properties, Inc., without their knowledge, the crux of their complaint in Count VIII was that they received only $8,625. of the $50,000 payment guaranteed by petitioners.

ary 27, 1978. (R.506-510). A motion for reconsideration of that order was filed by the petitioners here, but was denied by the district court on April 20, 1978. (R.675). Following the request of the respondents that judgment be entered in their favor on the motion for partial summary judgment, Security Management Co., Inc. and Bruce R. Davis, petitioners here, opposed the entry of that judgment in a brief filed on June 2, 1978. (R.681). On July 3, 1978, the district court entered its order directing that judgment as to Count VIII of the complaint be entered in favor of respondent Shirley Rothenberg and against petitioners Security Management Co., Inc. and Bruce R. Davis in the amount of $40,381.66, there being no just reason for delaying the entry of judgment in that amount. (R.756).

ARGUMENT

I.

THE ACTION OF THE DISTRICT COURT IN DIRECTING THAT JUDGMENT BE ENTERED IN FAVOR OF RESPONDENTS WAS A PROPER EXERCISE OF THAT COURT'S DISCRETION UNDER RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A. Whether a decision of a district court should be certified for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure is a determination vested initially in the discretion of the district court. That court's decision to enter an order pursuant to Rule 54(b) must be upheld unless it can be shown that the decision resulted from a clear abuse of that

discretion. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956). In reviewing the district court's exercise of its discretion, the primary consideration of the reviewing court should be to determine whether the claim with respect to which the Rule 54(b) certification has been entered was such that the plaintiff below would ordinarily have been expected to try that claim only as a part of the remaining judicial proceeding, to avoid piecemeal appellate review of cases based on the same or similar facts. *See, Curtis Wright Corp. v. General Electric Co.*, — U.S. —, 64 L.Ed 2d 1, 12 (1980). Initially, therefore, it should be noted that the interpretation of the guaranty contracts, the subject of Count VIII of the complaint and of this appeal, was a question of law for the court below so no trial would ever have been required with respect to Count VIII. *See* Georgia Code Anno. §20-701. Similarly, the undisputed facts relating to the guaranty contracts will have no effect on the trial of the remaining pending counts of the complaint which are grounded on securities fraud and general fraud and deceit. Consequently, there will be no piecemeal appellate review of the sole issue relating to Count VIII of the complaint, regardless of the eventual disposition of Counts VI and VII by the district court.

B. Petitioners here argue that the district court's entry of judgment in favor of respondents on Count VIII of the complaint pursuant to Rule 54(b) was inconsistent with that court's acceptance of pendent jurisdiction over that issue in the first place. This contention was never raised by petitioners either in the district court or in the brief or argument in the court of appeals (*See United States v. Ortiz*, 422 U.S. 891 (1975); *Neely v. Eby Construction Co.*, 386 U.S.

317 (1967); *Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977). It is also clear that the petitioners have misconceived the import of pendent jurisdiction. As noted by this Court in *United Mine Workers v. Gibbs, supra*, at 725, a state law claim will be considered pendent to existing federal jurisdiction if the state law claim and the federal cause of action arise from a common nucleus of operative facts and the plaintiff would ordinarily be expected to try all of the various claims in a single judicial proceeding. However, it is also clear that, once the various federal and state claims are incorporated into a single federal action, disposition of those claims in the most expeditious manner possible is solely within the discretion of the federal district court. *See, Siler v. Louisville & Nashville Ry. Co.*, 213 U.S. 175 (1909). Thus, the court below expressly accepted pendent jurisdiction over the state law claims embodied in Counts VII and VIII of the complaint, and, thereafter, proceeded to dispose of the state law claim embodied in Count VIII of the complaint by entering its order granting summary judgment to the respondents. Such action in no way conflicts with the concept of pendent jurisdiction over the state claim and the sole issue here is whether the district court's entry of judgment on that claim pursuant to Rule 54(b) was a proper exercise of discretion.

C. Petitioners have also raised, as a basis for the grant of certiorari in this case, the argument that the respondents had elected to rescind the stock purchase, which is the subject matter of the remaining action in the district court, by praying for return of their investment and by asserting claims under Sections 12(1) and 12(2) of the Securities Act of 1933. (15

U.S.C. §§77l(1) and (2)). The essence of this argument is either that the rescissionary remedy is inconsistent with recovery on the guaranty contract, or that the respondents would be entitled to a double recovery if they were allowed to recover on the guaranty contracts as well as on their 10(b)(5) damage claim still pending in the court below. The fallacy in petitioners' argument is that the rescissionary remedies have been stricken from the proceeding below on the petitioners' own motion, so they are hardly in a position to argue now that the respondents are still seeking a rescissionary remedy. Further, it is clear from the complaint that the respondents are seeking to recover the entire value of the stock purchased by them, which stock became worthless as a result of the alleged fraudulent actions and misrepresentations of the respondents and other defendants below, and also to recover the amount owed on the guaranty contracts, which represented a guaranteed return to them which was intended to be in addition to their original $50,000 investment in the corporation. Therefore, the cases cited by the petitioners in their attempt to establish that there are no remaining damages to be recovered in the action pending in the district court are inapplicable. In any event, whether or not there are any remaining potential damages to be recovered is an issue exclusively within the determination of the district court.

D. As a final argument that the entry of a Rule 54(b) order was an abuse of discretion, petitioners rely upon the existence of a state court action involving one of the two guarantees in question in this action, *Pisano v. Security Management Co., Inc.*, 148 Ga. App. 567, 251 S.E. 2d 798 (1978). The effect of the

Pisano action was considered by both the district court and by the United States Court of Appeals for the Fifth Circuit, both of which concluded that it had no effect on the decision in this case. Moreover, petitioners failed to point out that the decision of the district court granting summary judgment to respondents on Count VIII, involving the two guaranty agreements, was entered on January 27, 1978 (R.506) and that the district court's order denying a motion for reconsideration of that order was entered on April 20, 1978, (R.675), both of which orders were prior to the decision of the State Court of Fulton County in *Pisano v. Davis and Security Management Co., Inc.* in Civil Action No. 621029, entered on May 12, 1978. Thus, any actual error resulting from the failure to consider an earlier decision is that of the State Court of Fulton County which failed to consider the decision of the United States District Court for the Northern District of Georgia in a matter directly bearing on an issue pending before it. This same error was perpetuated in the Court of Appeals of Georgia when it rendered its decision on November 14, 1978. To the extent that a decision involving the guaranty payment to one stockholder in Security Management Co., Inc. would effect a collateral estoppel in an action filed by another stockholder of that corporation, (which is, in essence, the argument that petitioners are making here), the decision of the federal district court, as the prior decision, should have had such an estoppel effect on the State Court of Fulton County. In this regard, it is clear that the judgment of a federal court sitting in Georgia is conclusive on the courts of Georgia in the same manner, and to the same extent, that a decision of the courts of Georgia would be binding. *See*, for ex-

ample, *Chilivis v. Dasher*, 236 Ga. 669, 225 S.E. 2d 32 (1976). This rule would apply even where the federal court assumed jurisdiction over a state law claim by the exercise of its inherent power under the doctrine of pendent jurisdiction. *See, Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E. 2d 241 (1977) at 243.

It is clear that the district court acted within its discretion in entering judgment in favor of respondents on Count VIII of the complaint pursuant to Rule 54(b). The Rule 54(b) order was not entered until July 3, 1978, notwithstanding the original order granting summary judgment to the respondents on January 27, 1978 and the order denying reconsideration of the original order on April 20, 1978. Further, the Rule 54(b) direction to enter judgment was made after consideration of the brief in opposition to the request for entry of judgment filed by petitioners here (R.681-685), and after certified copies of the state court decision in *Pisano v. Bruce R. Davis and Security Management Co., Inc.* had been submitted to the court (R.614-660). Despite the implication of the petitioners that the district judge who entered the Rule 54(b) certification order had only limited familiarity with the case, it should be noted that the case was assigned to the Honorable Harold Murphy on August 16, 1977, (R.3), and that it was Judge Murphy who entered the order dated, November 18, 1977, dismissing Counts II and IV of the complaint on the motion of petitioners' and other defendants below. The court below was fully aware of, and familiar with, all of the issues in the case, had full opportunity to review the petitioners' objections to the entry of judgment pursuant to Rule 54(b), was fully aware of the decision by the State Court of Fulton County, Georgia, and expressly con-

sidered these matters in entering the order under Rule 54(b). (R. 756). Consequently, there is no basis for concluding that the district court abused its discretion in entering judgment under Rule 54(b). *See, Curtis Wright Corp. v. General Electric Co. supra.*

II.

NO SEPARATE WRITTEN STATEMENT OF REASONS FOR THE ENTRY OF AN ORDER PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS REQUIRED BY THAT RULE OR BY ANY DECISION OF THIS COURT.

As the second ground for their contention that a writ of certiorari should issue in this matter, petitioners contend that the decision by the court below was in conflict with the decision of this Court in *Curtis Wright Corp. v. General Electric Co., supra.*, and with decisions of the Courts of Appeal for the Second, Third and Seventh Circuits. The alleged conflict results from the decision of the court below that Rule 54(b) does not expressly require a brief, separate statement of the reasons supporting the Rule 54(b) entry. Petitioners allege that that decision is in conflict with *U.S. General, Inc. v. City of Joliet*, 598 F.2d 1050 (7th Cir., 1979); *Arlinghaus v. Ritenour*, 543 F.2d 461 (2nd Cir., 1976); *Gumer v. Shearson, Hammill & Co., Inc.* 516 F.2d 283 (2nd Cir., 1974); and, *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3rd Cir., 1975).

Although by its terms Rule 54(b) requires only

that the court below determine that there is no just reason for delay in entry of judgment and that the court direct the clerk to enter judgment accordingly, the Courts of Appeal for the Second, Third and Seventh Circuits have adopted the requirement that a brief statement of reasons for a Rule 54(b) determination should also be set out by the district court. It should be noted that in none of the cases cited by the petitioners was a case remanded to the court below solely as a result of the failure of the district court to include a separate statement of the reasons supporting the Rule 54(b) certification. Rather, in each case there was some existing defect in the Rule 54(b) procedure required by the Rule itself, which necessitated a remand. As part of the remand, each court of appeals in question added the suggestion, which has been made mandatory only by the Court of Appeals for the Third Circuit, that a separate statement of the reasons for the Rule 54(b) order be set forth to aid the court of appeals in reviewing the exercise of discretion by the court below. Thus, in *U.S. General, Inc. v. City of Joliet, supra*, the Rule 54(b) certification procedure was not in issue, but the Court considered the matter nonetheless. (598 F.2d at 1051, fn. 1). The Court first noted a defect in the district court's application of the required Rule 54(b) procedure, and then suggested that a proper exercise of the district court's discretion under Rule 54(b) should also include a statement of the underlying reasons for the exercise of that discretion. Nevertheless, that Court concluded, after an examination of the record in the case, that the Rule 54(b) requirements had been satisfied, despite the obvious procedural errors and despite the lack of a separate statement of the reasons for the entry of the order. In the instant case, the court below merely held

that Rule 54(b) contains no specific requirement that a separate statement explaining the reasons for applying the Rule be set forth by the district court, and that the inclusion of such a statement is left to the discretion of the district court. Thus, the decision of the court below is not inconsistent with the decisions of the Second and Seventh Circuits, both of which have held that such a separate statement of reasons is desirable, and is consistent with its own prior decisions in *Huckeby v. Frozen Food Express*, 555 F.2d 542 (1977) and *Kirtland v. J. Ray McDermott & Company*, 568 F.2d 1166 (1978), in which the addition of a separate statement was suggested but not required. Only the Court of Appeals for the Third Circuit has gone further and expressly provided in its local rules that a proper statement of the reasons for the Rule 54(b) certification must be provided by the district court. *See*, Local Rule 21(1)(A)(b)(i) of the United States Court of Appeals for the Third Circuit. Similarly, the decision of this Court in *Curtis Wright Corp. v. General Electric Co., supra*, is not in conflict with the decision below. In *Curtis Wright Corp.*, this Court noted that the district court had provided a written statement of reasons supporting its decision which identified the various factors that had entered into its exercise of discretion. However, the appeal to this Court was from the Court of Appeals for the Third Circuit, which, as noted, expressly requires such a separate statement.

III.

THE DECISION BELOW IS NOT IN CONFLICT WITH A DECISION BY THE COURT OF APPEALS OF GEORGIA.

Petitioners contend that the decision below is inconsistent with the decision of the Court of Appeals of Georgia in *Pisano v. Security Management Co., Inc., supra.* The effect of the decision of the Court of Appeals of Georgia was fully considered by the court below pursuant to briefs and arguments of the parties, and the court below concluded that the decision was inapplicable on its face. Consequently, the court below did not even consider the respondents' alternative argument that the decision of the district court in this case should have had collateral estoppel effect in the state court proceedings, and, therefore, that the decision of the Court of Appeals of Georgia was erroneous as a matter of law. As a result, the only issue for consideration on this petition is whether the published decision of the Court of Appeals of Georgia is inconsistent with the decision below, which held that the Court of Appeals of Georgia decision applied to only one of the two guarantees involved in Count VIII of the complaint and, therefore, was not inconsistent with the decision of the district court. Petitioners argue that the Court of Appeals of Georgia ruled on the same issues and on the same arguments which were presented to the court below, (Pet. 28, 29), referring to matters which are not a part of the record before this Court. The court below concluded, based upon its analysis of the decision of the Court of Appeals of Georgia and on its own review of the decision of the district court, that the two decisions were not inconsis-

tent and that the decision of the district court was correct in this case. Nothing in the record before this Court indicates anything to the contrary and the decision in *Pisano* should be treated as an independent, unrelated decision involving only one of the guaranties involved here, as did the court below. The general rule that a determination of local law made by a federal district court or a federal court of appeals is normally accepted as correct, should be followed here. *See, Second National Bank of New Haven v. United States,* 387 U.S. 456 (1967); *Commissioner v. Bosch's Estate,* 387 U.S. 456 (1967); *Cort v. Ash,* 422 U.S. 66 (1975); *Richards v. United States,* 369 U.S. 1 (1962); *Butner v. United States,* 440 U.S. 48 (1979); *Runyon v. McCreary,* 427 U.S. 160 (1976).

IV.

THE COURT BELOW DID NOT ERR IN REFUSING TO STAY THE ENTRY OF ITS MANDATE IN VIEW OF A DECLARATORY JUDGMENT ACTION FILED BY THE PETITIONERS IN A STATE TRIAL COURT.

After the decision of the court below was entered in this matter, the petitioners filed a state court action seeking a declaratory judgment to the effect that they were not liable to the respondents here on the guaranty contracts in question. At the same time, the petitioners filed a motion in the court below asking it to stay the entry of its mandate in view of that declaratory judgment action. This motion was denied on July 21, 1980 and the petitioners here assign error to that denial. The denial was not error, since under the circumstances, the declaratory judgment action

is not proper in the state trial court, and, therefore, nothing would be gained by any further delay in these proceedings. A declaratory judgment action is available in the state trial courts of Georgia only "in cases of actual controversy". *See* Ga. Code Anno. §110-1101 (a). Obviously, no actual controversy can exist in a situation where the rights of the parties as to which the declaratory judgment is sought have already been fully adjudicated by a court of competent jurisdiction. In this regard, Ga. Code Anno. §110-501 provides:

> *Conclusiveness of judgments.* A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been at issue in the cause wherein the judgment was rendered, until such judgment shall be reversed or set aside.

Pursuant to this statutory provision, a declaratory judgment action, or for that matter any form of action, in a state trial court involving the same subject matter which was involved in the case below would be barred by the doctrine of estoppel by judgment. *See, Brown v. Brown*, 212 Ga. 202, 91 S.E. 2d 495 (1956); *Woods v. Delta Airlines, Inc.*, 237 Ga. 332, 227 S.E. 2d 376 (1976). For this purpose, it is irrelevant whether the prior decision had been rendered by a court of competent jurisdiction of the State of Georgia or a federal court sitting in Georgia (*Chilivis v. Dasher, supra.*) or that the basis of the federal court's jurisdiction in the prior action was pendent jurisdiction over a state law claim. *Pope v. City of Atlanta, supra.* The action of the court below in refusing to stay its mandate was not error.

V.

THE COURT BELOW DID NOT ERR IN ITS REFUSAL TO CERTIFY CERTAIN QUESTIONS TO THE SUPREME COURT OF GEORGIA AS REQUESTED BY PETITIONERS IN THEIR PETITION FOR REHEARING.

At no time during the consideration of the case below and prior to the entry of its decision was it requested by the petitioners that the state law questions in issue be certified to the Supreme Court of Georgia. It was not until after the decision of the Court of Appeals had been rendered that the petitioners requested certification in their petition for rehearing *en banc*. Certification of a question to the highest court of a state is a proper alternative which a court of appeals can adopt in an appropriate circumstance, if, in its discretion, it deems such a certification to be beneficial. (*Lehman Bros. v. Schein*, 416 U.S. 386 (1974)). However, the only ground alleged by petitioners in support of their contention that the court below erred in failing to certify the question to the Supreme Court of Georgia is that the panel below contained no lawyers trained in Georgia law. Further, it appears from the petitioners' petition for certiorari in this Court that they are requesting that the certification be made to the Superior Court of DeKalb County, Georgia, a state trial court, rather than to the Supreme Court of Georgia, a procedure which is not available. The refusal of the court below to certify any questions to the Georgia courts was a proper exercise of its discretion and was not error.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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On the Brief